IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. MESKIMEN

STATE OF NEBRASKA, APPELLEE,
V.
MICHAEL I. MESKIMEN, APPELLANT.

Filed March 23, 2010. No. A-09-917.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Brett B. Pettit, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Michael I. Meskimen pled no contest to fifth-offense driving under the influence (DUI) and was sentenced to 3 to 8 years' imprisonment. Meskimen appeals his conviction and sentence. Because the sentence results from a no contest plea, under Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), we do not hear oral argument on this case. For the reasons set forth herein, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 12, 2008, Meskimen was pulled over by Lincoln police officers for making an illegal right turn. The officer noticed that Meskimen had red, watery, and bloodshot eyes and that there was a strong odor of alcohol emitting from his person. Meskimen admitted to consuming alcohol and having a suspended license. Meskimen refused a preliminary breath test, and he was arrested. Meskimen also refused a chemical breath test after he was transported to jail.

Meskimen was charged in an information filed in the district court for Lancaster County on February 20, 2009, with fifth-offense DUI, pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 2004), which is a Class III felony under Neb. Rev. Stat. § 60-6,197.03(9) (Supp. 2007). Appearing with his retained counsel, Kevin Oursland, Meskimen entered a plea of not guilty at his arraignment on February 25. On May 6, Meskimen withdrew his not guilty plea and the district court accepted his plea of no contest to the charges in the information.

Meskimen filed a pro se motion to withdraw his plea and a pro se motion for new trial on June 22, 2009. Meskimen filed identical motions on June 30 and again on July 8. Meskimen's retained counsel, Oursland, filed another motion to withdraw the guilty plea on July 16. Oursland also filed a motion to withdraw as counsel, alleging that Meskimen, in his pro se motions, claimed to be entitled to withdraw his plea due to ineffective assistance of counsel, and such action caused an irremediable breakdown in the attorney-client relationship. The district court sustained the motion to withdraw and appointed the Lancaster County public defender to serve as counsel for Meskimen. Meskimen's appointed counsel filed a motion to withdraw the no contest plea on July 30. The district court held a hearing on such motion on August 13. In its August 14 order, the district court overruled the motion to withdraw the no contest plea, finding that Meskimen did not present fair and just reasons why he should be allowed to withdraw his plea or evidence that provided a defense to the underlying charge.

Meskimen's appointed counsel filed a motion for new trial on August 13, 2009. In its August 26 order, the district court overruled the motion, finding that exhibits 1, 2, and 4 were properly received for enhancement of Meskimen's offense to fifth-offense DUI and that Meskimen may not collaterally attack such prior judgments. In the sentencing order also filed August 26, the district court sentenced Meskimen to a term of imprisonment of 3 to 8 years. The district court also ordered Meskimen to not drive any motor vehicle in Nebraska for 15 years beyond the date he is released from prison. Meskimen timely appealed to this court.

ASSIGNMENTS OF ERROR

Meskimen assigns as error that (1) the district court denied his request to withdraw his plea of no contest; (2) the district court received exhibits 1 and 4 into evidence over his objections that the records of the court proceedings were not final judgments as they lacked file stamps; (3) the district court found that Meskimen had four prior DUI convictions and found him guilty of a fifth-offense DUI; (4) his trial attorney provided ineffective assistance of counsel, which denied his right to due process and his right to effective assistance of counsel under the U.S. and Nebraska Constitutions; and (5) the district court imposed an excessive sentence.

STANDARD OF REVIEW

The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

ANALYSIS

Withdrawal of Plea.

Meskimen argues that the district court should have allowed him to withdraw his plea of no contest because his retained counsel did not adequately explain the consequences of such a plea prior to the plea hearing on May 6, 2009. At the hearing on his motion to withdraw his plea on August 13, Meskimen stated that his lawyer only talked with him briefly before the May 6 hearing, that he was scared and intimidated at the time, and that he needed further time to discuss his options with his new attorney. Meskimen testified at the August hearing that his lawyer informed him a month before the May hearing that the State may be amending the charge, which would increase the possible penalty considerably. Meskimen also testified at the August hearing that he did not discuss all of the consequences with his attorney prior to his plea, but he also stated that he knew the consequences and that the problem was that he did not have sufficient time to process his decision.

After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Schurman*, 17 Neb. App. 431, 762 N.W.2d 337 (2009). The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *Id.*

Meskimen had four prior DUI convictions based upon violations occurring in 1997, 2002, 2004, and 2008. Meskimen pled guilty to all four prior DUI charges. Even without legal training, Meskimen had clearly been through this process before and admitted that he knew the consequences of a plea of no contest. Meskimen also admitted that he knew that he was charged with fifth-offense DUI. At the May 6, 2009, hearing, Meskimen did not express any reservations or complaint about the advice he received from his retained counsel and expressed that he had enough time to discuss the case with his counsel. Meskimen also stated that he was making his decision to enter the plea of no contest freely and voluntarily and did not have any questions about the plea. The court accepted Meskimen's plea based upon such testimony and a sufficient factual basis for the charge in the information.

In its order on the motion to withdraw the no contest plea, the district court characterized Meskimen's reason for seeking withdrawal as "buyer's remorse" and stated that Meskimen was now claiming that his answers to the questions posed at the May 6, 2009, hearing were untrue. We agree with the district court's characterization. Meskimen clearly indicated that he

understood the rights he was giving up by pleading no contest, the offense with which he was charged, the possible amendment to the information should he choose not to plead guilty or no contest, and the consequences of his plea. Meskimen did not present evidence of any just or fair reason to justify withdrawal of his plea, and the district court did not abuse its discretion in overruling Meskimen's motion. Meskimen's first assignment of error lacks merit.

Exhibits 1 and 4.

Meskimen argues that exhibits 1 and 4, which purported to show prior DUI convictions, were not judgments because the plea and sentencing orders did not have file stamps and therefore should not have been admitted by the court for enhancement of the current offense to fifth-offense DUI. Meskimen cites *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995), and *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214 (1991). Meskimen claims that his objections in the motion for a new trial to the judgments contained within exhibits 1 and 4 were not impermissible collateral attacks on the judgments because such were not in fact judgments.

Meskimen concedes that his counsel did not object to exhibits 1 and 4 when they were offered by the State. Meskimen did attack the validity of these exhibits in his motion for a new trial. Generally, to preserve a claimed error in admission of evidence, a litigant must make a timely, specific objection. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). A party waives the right to assert error arising from trial court's reception of evidence by failing to timely object. *Id*.

However, even if Meskimen's counsel had objected to exhibits 1 and 4, preserving the right to assert the error, admission of such was not an abuse of discretion by the district court. In *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009), the Nebraska Supreme Court stated that collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *Id.* The defendant claimed that without a file stamp, a prior conviction is not final, also relying on *Estes, supra*. The Supreme Court disagreed, finding that the defendant in *Macek* was making an impermissible collateral attack on his prior DUI convictions and that those prior convictions were properly used for enhancement purposes. Meskimen is also arguing that his prior convictions are not final due to missing file stamps. The Supreme Court rejected a similar argument in *Macek*, finding that such was an impermissible collateral attack. Thus, this argument lacks merit.

Guilt of Fifth-Offense DUI.

Meskimen argues that the court could have found him guilty of only third-offense DUI, because exhibits 1 and 4 did not contain judgments, meaning that only two of his prior convictions were valid for enhancement. However, we have already determined that the prior convictions contained in exhibits 1 and 4 were judgments and could properly be used for enhancement. The State did show, by a preponderance of the evidence, that Meskimen had four prior convictions, thus warranting a charge of fifth-offense DUI. See *Macek, supra* (to prove prior conviction for enhancement, State must prove such by preponderance of evidence). Therefore, this assignment of error also lacks merit.

Ineffective Assistance of Counsel.

Meskimen argues that his retained counsel was ineffective because he failed to adequately investigate the facts of the case and prepare a defense, failed to fully inform

Meskimen of the consequences of entering a no contest plea, failed to provide adequate advice as to entering a plea, failed to object to exhibits 1 and 4, and failed to argue at the enhancement hearing that exhibits 1 and 4 did not constitute judgments. Meskimen asserts that he would not have pleaded no contest to the charge had he been adequately advised.

Generally, for a claim of ineffective assistance of counsel, under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant has the burden to show that (1) counsel performed deficiently--that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area--and (2) this deficient performance actually prejudiced him in making his defense. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010). When a conviction is based upon a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

Meskimen concedes in his brief that an evidentiary hearing is required to address his claims of ineffective assistance of counsel and that the record is not sufficient for us to review his claims in this appeal. Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009). When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.* For all of Meskimen's claims, except the last two regarding the admissibility and import of exhibits 1 and 4, the record is insufficient to review whether his retained counsel was ineffective. Thus, we do not address those claims here.

The record is sufficient, however, to review Meskimen's retained counsel's failure to object to exhibits 1 and 4 and failure to argue at the enhancement hearing that exhibits 1 and 4 did not constitute judgments. Because we have previously determined that exhibits 1 and 4 were in fact judgments and were properly used to enhance Meskimen's offense to fifth-offense DUI, Meskimen's counsel did not perform deficiently with respect to the admission of such exhibits or in failing to argue that such exhibits did not provide the necessary predicate evidence of this conviction of fifth-offense DUI. Therefore, we determine the particular claim of ineffective assistance of counsel against Meskimen. The other claims of ineffective assistance of counsel cannot now be decided because the record is insufficient.

Excessive Sentence.

Meskimen argues that his sentence, 3 to 8 years in prison, was excessive and that the court abused its discretion by failing to sentence him to probation. Meskimen argues that the district court did not credit mitigating circumstances that justified probation, such as his willingness to enter a treatment program and his employment and family history.

Fifth-offense DUI is a Class III felony pursuant to § 60-6,197.03(9). A Class III felony is punishable by 1 to 20 years in prison, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue

2008). Meskimen's sentence, therefore, falls within the statutory limits of § 28-105. Meskimen argues that § 60-6,197.03(9) authorizes probation, and as such, he should have been sentenced to probation rather than imprisonment. This section does authorize probation, but it does not require a sentence of probation, and it requires at least 180 days' imprisonment. The offense, fifth-offense DUI, is a Class III felony, which requires imprisonment. Therefore, the court had the discretion to impose a sentence of imprisonment alone, rather than some combination of imprisonment and probation.

When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). Meskimen has four prior DUI convictions, one of which was less than a year before the current charge, and six prior convictions for driving on a suspended license. Meskimen admitted that he had a problem with alcohol. Meskimen had only been charged with first- or second-offense DUI, and not third- or fourth-offense DUI, and so his prior sentences included probation. The district court did clearly consider Meskimen's employment and family history as mitigating factors, even calling him a "decent guy." However, based upon his past record of similar charges, and seriousness of the offense, and his admitted alcohol problem, the district court did not abuse its discretion in sentencing Meskimen to imprisonment rather than probation.

Meskimen also argues that the district court based the sentence on personal beliefs, disapproved in *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998), because the court commented on the tragedy of individuals killed by drunk drivers and stated that "there is probably no one who poses a greater danger to the public at large than people who drive under the influence of alcoholic liquor . . . and probation would not be appropriate. It certainly would depreciate the seriousness of the offense." In *Pattno, supra*, the Nebraska Supreme Court found that the sentencing judge had improperly interjected his own religious views relating to Pattno's sexual orientation. The trial judge's observations, which we share, about the dangers to society from drunk drivers are hardly comparable to the improper comments by the trial judge in *Pattno, supra*, that were based on the judge's religious beliefs. The district court was merely commenting on the seriousness of the offense as a justification for why probation was not appropriate in this case. The nature of the offense can properly be considered by a sentencing court, and as such, the district court did not abuse its discretion by basing its sentence on personal beliefs. This assignment of error lacks merit.

CONCLUSION

Finding that all of Meskimen's assignments of error lack merit, we affirm his conviction and sentence.

AFFIRMED.